CASE NO. 06-5618

ORIGINAL

SUPREME COURT OF THE UNITED STATES
October 2005 Term

Supreme Court, U.S.
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MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE EIGHTH CIRCUIT COURT OF APPEALS

Submitted on Behalf of Petitioner

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QUESTIONS PRESENTED

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory use of the United States Sentencing Guidelines violated the Sixth Amendment right to a jury trial of any fact required to enhance a criminal sentence. The Court remedied the error by making the Guidelines "effectively advisory", one of many factors a court considers in choosing a sentence under 18 U.S.C. § 3553(a). The Court also prescribed appellate review of sentences for "reasonableness" in light of all the section 3553(a) factors and the reasons for the sentence as stated by the sentencing judge. The model of review on which *Booker* based this "reasonableness" standard paid "substantial deference" to a sentencing judge's discretionary choices in departing from the guidelines range, as held in *Koon v. United States*, 518 U.S. 81, 98 (1996).

In light of the foregoing, these issues are presented:

1. Does an appellate court make the Sentencing Guidelines effectively mandatory by granting a presumption of reasonableness to the Guidelines range, rather than granting deference to the sentencing judge's decision in light of all the section 3553(a) factors?

2. Does granting a presumption of reasonableness to the guidelines range deny the substantial deference granted a district court's discretionary sentencing decision under the "reasonableness" standard chosen in *Booker*?

PARTIES

The petitioner, Mario Claiborne, has at all times been represented by Lee T. Lawless, Federal Public Defender for the Eastern District of Missouri, 1010 Market, Suite 200, Saint Louis, Missouri, 63101, and Michael Dwyer, Assistant Federal Public Defender in the same office. The United States is represented by United States Attorney Catherine Hanaway, Eastern District of Missouri, and Assistant United States Attorney Cristian M. Stevens, 111 South Tenth Street, Saint Louis, Missouri, 63102.

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED ii

PARTIES iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINION BELOW viii

JURISDICTION ix

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED x

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

REASON FOR GRANTING WRIT

I. **The Court should resolve whether granting the Sentencing Guidelines range a "presumption of reasonableness" when assessing the reasonableness of a non-guidelines sentence negates *Booker*'s constitutional remedy and produces a *de facto* binding guidelines regime** 6

***Booker* remedy requires "effectively advisory" guidelines, not presumptive guidelines sentencing** 8

Appellate "presumption of reasonableness" in Guidelines produces *de facto* mandatory guidelines 11

The Eighth Circuit's endorsement of the Guidelines range for cocaine base is unreasonable in light of Commissions's reports that the 100:1 crack/powder ratio is unjustified 15

Granting a presumption of reasonableness to the Guidelines range denies the substantial deference owed a judge's discretionary sentencing decision under "abuse of discretion" standard..... 17

The split among the circuits of the courts of appeals regarding a presumption of reasonableness in the guidelines range promotes sentencing disparities 22

CONCLUSION 25

Appendix

TABLE OF AUTHORITIES

CASES CITED:

Kern v. TXO Production Corp., 738 F.2d 968 (8th Cir. 1984 21

Koon v. United States, 518 U.S. 81 (1996) ..... ii, 7, 17, 18, 20

Solem v. Helm, 463 U.S. 277 (1983) 18

Williams v. United States, 503 U.S. 193 (1992) 18

United States v. Booker, 543 U.S. 220 (2005) ..... ii, 5-12, 14, 17-19, 22-23

United States v. Claiborne, 439 F.3d 479 (8th Cir. 2006) 6, 8, 11, 12, 13

United States v. Dalton, 404 F.3d 1029 (8th 2005) 3

United States v. Fernandez, 443 F.3d 19 (2nd Cir. 2006) 14

United States v. Haack, 403 F.3d 997 (8th Cir. 2005) 7, 21

United States v. Jimenez-Beltre, 440 F.3d 514 (1st Cir. 2006) 12, 14

United States v. Lee, 2006 U.S. APP. LEXIS 18173 (8th Cir., July 20, 2006) 22

United States v. McMannus, 436 F.3d 871 (8th Cir. 2006) 11

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) 8, 22

United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006) 14

FEDERAL STATUTES

21 U.S.C. §841 ..... x, 1

21 U.S.C. § 844 ..... x, 1

18 U.S.C. §3553(a) ..... ii, 6, 9-13, 15-16

18 U.S.C. §3553(b) ..... xii, xiii, 4, 6, 8, 9, 14

18 U.S.C. § 3742(e) ..... xiii, 9, 10, 17, 22

28 U.S.C. §1254(1) ix

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI ..... ii, x, 8

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. §2D1.1(c)(14) 16

U.S.S.G.§ 5K2.0(d)(1) 12

U.S.S.G. § 5K2.13 12

U.S.S.G. § 5K2.20(c) 12

OTHER AUTHORITIES:

U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("Fifteen Year Report") (2004) 12

U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997) 15

U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 10 (2002) 15

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 439 F.3d 479 (8th Cir. 2006). A copy of the Eighth Circuit's original slip opinion appears at pages 1-4 of the Appendix to this petition.

JURISDICTION

Petitioner seeks review of the judgment issued by the Eighth Circuit Court of Appeals on February 27, 2005, reversing petitioner's sentence and remanding the case for resentencing. Appendix, p. 1. Petitioner filed a motion for rehearing and for rehearing *en banc*. The court of appeals denied the petition for rehearing on April 27, 2006, with two members of the Eighth Circuit dissenting from the denial of rehearing. Appendix, p. 5. This petition for certiorari is timely filed within ninety-days of the ruling on the petition for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS

The applicable constitutional provision is Amendment VI to the United States Constitution, which provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." US. Const. Amend. VI.

STATUTORY PROVISIONS:

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally–

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. . . . [A] person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance

exceeds 5 grams . . . .

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.– The court shall impose a sentence sufficient, but not greater than necessary to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for–

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines–

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments

made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by at of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.–

(1) In general. – Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses – [omitted].

18 U.S.C. § 3742. Review of a sentence

(e) Consideration.– Upon review of the record, the court of appeals shall determine whether the sentence–

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that–

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(c) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

STATEMENT OF THE CASE

The government indicted Mario Claiborne on charges that he distributed 0.23 grams of cocaine base in May of 2003, a violation of 21 U.S.C. § 841(a)(1), and possessed 5.03 grams of cocaine base on November 2, 2003, a violation of 21 U.S.C. § 844(a). The latter charge carried a statutory minimum sentence of five years, but the district court found that Claiborne, who had no prior criminal history, qualified for safety-valve relief from that statutory minimum sentence, 18 U.S.C. § 3553(f). The court calculated the advisory sentencing guidelines range at 37 to 46 months, a calculation that neither party has disputed.

Claiborne was twenty-one when he came before the district court for sentencing. Sentencing Tr. p. 21. Defense counsel noted to the district court that Claiborne secured employment within a month of posting bond. *Id.* p. 17. Claiborne complied with the condition that he attend drug counseling while on bond and lived with and supported his girlfriend and their two children, as well as his girlfriend's older child from a prior relationship. Presentence Report pp. 5-6. Counsel also pointed out Claiborne's success supporting his family while on bond and urged the court "to continue the momentum of that success" by sentencing him "considerably lower than what the guidelines would call for." Sentencing Tr. p. 18.

Defense counsel argued that the 37 to 46 month range was too high, noting, among other things, the disparate treatment of cocaine base compared to cocaine powder. Counsel stressed the unreasonableness of the 100:1 drug quantity ratio between powder and crack cocaine employed by the advisory sentencing guidelines and pointed to the conclusions of the United States Sentencing Commission itself that this disparate treatment "cannot be justified." Counsel noted that, had Claiborne been prosecuted for a total of 5.26 grams of cocaine powder rather than cocaine base, the guidelines range would have been 6 to 12 months.

The district court addressed Claiborne and admonished him for engaging in the drug sales on which his prosecution were based:

> . . . Selling drugs is not the way to support yourself. It was not the way to support your family. Because, as you stand here now, you are about to go to prison. You're not going to be able to support your family from prison.
>
> So you need to ask yourself: Is there something else I can do to provide financial support for myself and my family that will not place me in jeopardy of being taken away from them and incarcerated for – but for your being granted these objections – a minimum of 60 months. That's a long time for someone to be sent away from their family.

The judge specifically addressed the guidelines range:

> I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history

which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.

However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.

I don't think that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – much amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

Sentencing Tr. 23-24. The judge imposed concurrent 15-month sentences, plus 3 years of supervised release with drug testing and drug counseling. *Id.* at 25-26.

A panel of the Eighth Circuit Court of Appeals declared the district court's sentence unreasonable. The panel labeled the sentence an "extraordinary variance" because 15 months is 60% of the low end of the guideline range (37 months), and further declared:

> An extraordinary reduction must be supported by extraordinary circumstances." *United States v. Dalton*, 404 F.3d 1029, 1033 (8th 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially

> reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

Appendix pp. 3-4. The panel made no reference in its opinion to the district court's ruling that sentencing Claiborne to a term within the guideline range "would be tantamount to throwing [him] away." The court of appeals's "fair inference" is wholly unsupported by the record. The only evidence in the record concerned the two counts in the superseding indictment for which Claiborne accepted responsibility. Nothing in the record, including the Presentence Report (PSR), supported any allegation or evidence of any other drug sales.

Petitioner filed a motion for rehearing. He argued that the Eighth Circuit's application of a "presumption of reasonableness" to the guidelines range, and its requirement that district courts provide justification for non-guidelines sentences proportionate to their percentage of variance from the guidelines effectively resurrected the procedure of 18 U.S.C. § 3553(b), stricken by *Booker*. Petitioner also argued that the Court of Appeals' substitution of its own judgment that the

circumstances did not warrant a variance reflected a *de novo* standard of review that conflicted with the "reasonableness" review ordered by this Court in *United States v. Booker*, 543 U.S. 220 (2005). The panel opinion made no mention of the district court's judgment that imprisoning Claiborne for 36-47 months "would be tantamount to throwing [Claiborne] away." The Eighth Circuit denied the petition for rehearing on April. 27, 2006. Appendix, p. 5. Two members of the court dissented from the denial of rehearing. Appendix, p. 5.

REASONS FOR GRANTING THE WRIT

I. The Court should decide whether granting the Sentencing Guidelines range a "presumption of reasonableness" when assessing the reasonableness of a non-guidelines sentence negates *Booker*'s constitutional remedy and produces a *de facto* binding guidelines regime.

> "Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside the Guidelines range? . . . Time may tell . . ."

United States v. Booker, 543 U.S. 220, 313 (2005) (SCALIA, J., dissenting in part)

The reasonableness review developed in the Eighth Circuit answers Justice Scalia's cautionary inquiry with a clear "yes." The circuit reviews non-Guidelines sentences from a premise that the Guidelines established the reasonable range of sentencing. *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), Appendix p. 3. The Eighth Circuit measures reasonableness by examining (1) whether the district court's justification for deviating from the Guidelines is reasonable and (2) whether the extent of the deviation is reasonable. *Id.* This approach shifts the appellate focus from assessing the reasonableness of the district court's stated reasons for the sentence against all the § 3553(a) factors to the limited question of whether the judge reasonably chose to depart from the guidelines range and whether the extent of that guidelines variance was reasonable. The Eighth Circuit's version of "reasonableness" review revives 18 U.S.C. § 3553(b), which

"required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)". *See United States v. Booker*, 543 U.S. at 259.

Further, the Eighth Circuit's presumption that the Guidelines range is reasonable replaces the substantial deference historically granted to a sentencing judge's discretion in resolving the myriad considerations involved in choosing a sentence. *See Koon v. United States*, 518 U.S. 81, 97-99 (1996). That deference played an established role in the pre-2003 appellate review of sentences imposed outside the applicable guidelines range on which this Court modeled the reasonableness review ordered in *Booker*. *See Booker v. United States*, 543 U.S. at 261; *Koon v. United States*, 518 U.S. at 98. Far from granting deference to the district court's discretionary judgment, the Eighth Circuit warns district court judges that the facts in any given case can only ever support a "limited range of choice". *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir. 2005).

The Eighth Circuit's guidelines-focused style of reasonableness review conflicts with the appellate review mandated by *Booker* and *Koon*. At least three circuits – the First, Second, and Third – do not employ a presumption of reasonableness in the guidelines range to review non-guidelines sentences. *See* page14 *infra*. This conflict in appellate review invites disparate sentences. *Compare*

United States v. Claiborne, 439 F.3d at 481 (8th Cir.), and *United States v. Williams*, 435 F.3d 1350, 1355 (11th Cir. 2006) (affirming reasonableness of sentence 50% below guidelines range for selling crack cocaine chosen in light of defendant's age, minimal criminal record, and medical condition). Certiorari is warranted to prevent the inevitable sentencing disparities caused by the different circuit approaches to sentencing review.

Booker remedy required "effectively advisory" guidelines, not presumptive guidelines sentencing

The United States Sentencing Guidelines violated the Sixth Amendment right to jury trial because they required judges rather than juries to find facts that led to enhanced sentences. *See United States v. Booker*, 543 U.S. at 245. The constitutional problem arose because judges were essentially bound to impose the guidelines range almost all the time. *See id.* at 259. Section 3553(b) made the guidelines "binding" on judges because it "required sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure)," 543 U.S. at 259. The fact that the statute allowed judges to impose sentences outside the guidelines range did not render the guidelines advisory, because such departures were not available in every case, "and in fact [were] unavailable in most." 543 U.S. at 234. In effect, the Sentencing Reform Act

that led to the creation of the Guidelines, 18 U.S.C. § 3591 *et seq* (SRA), made the Guidelines the "presumptive" sentencing range that bound judges' sentencing decisions most – but not all – of the time. *Id.*

This Court chose a constitutional remedy intended to render the sentencing guidelines "effectively advisory". *United States v. Booker*, 543 U.S. at 245. The Court sought to achieve this result by (1) eliminating the statutory provision in §3553(b) that required district courts to impose guidelines sentences "in the absence of circumstances that warranted a departure," and (2) by eliminating the appellate review provisions intended to enforce guidelines sentencing (section 3742(e)). *United States v. Booker*, 543 U.S. at 259, 261. In excising section 3553(b), the Court directed that sentencing judges make individual sentencing decisions grounded in all the facts set forth in 18 U.S.C. § 3553(a). *See* 543 U.S. at 245. Sentencing judges must still consider the guidelines range as one such factor, but the constitutional remedy required that judges be free to impose non-guidelines sentences grounded in the other 3553(a) considerations. *Id.* Those factors included "the nature and circumstances of the offense and the history and characteristics of the defendant", the need to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment", to "protect the public", to provide the defendant with training, care, "or other

correctional treatment in the most effective manner," and the need to avoid unwarranted sentence disparities. 18 U.S.C. §§ 3553(a)(1), 3553(a)(2)(A) - (D), 3553(a)(6).

In excising the appellate review provisions of section 3742(e), the Court recognized a surviving right to appellate review of sentences to determine whether they are "unreasonable". *Booker*, 543 U.S. at 261. The Court modeled such review on the reasonableness review previously applied to non-guidelines sentencing according to the pre-2003 version of Section 3742(e). *Id.* Under this standard, appellate courts assess the district court's sentence

> "with a view toward determining whether such a sentence '*is unreasonable*, having regard for . . . the factors to be considered in imposing a sentence, as set forth in [§ 3553(a)], and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c)."

United States v. Booker, 543 U.S. at 261, *quoting* 18 U.S.C. § 3742(e)(3) (1994 ed.) (emphasis added in *Booker*).

A significant feature of the new "reasonableness" review "is that it requires courts of appeals to evaluate each sentence *individually* for reasonableness, rather than apply the cookie-cutter standards of the Guidelines (within the correct Guidelines range, affirm; outside the range without adequate explanation, vacate and remand)." *Booker*, 543 U.S. at 312 (Scalia, J., dissenting)(emphasis in

original).

Appellate review granting "presumption of reasonableness" in guidelines produces *de facto* "mandatory guidelines"

The Eighth Circuit's guidelines-focused style of review applies the "cookie-cutter" style of appellate review that *Booker* struck down. *Booker* instructed appellate courts to assess criminal sentences against the full range of sentencing factors listed in § 3553(a). *See* 543 U.S. at 261. The Eighth Circuit, instead, reviews both non-guidelines sentences and guidelines sentences alike from a starting presumption that the Guidelines establish the range of reasonable sentencing. *United States v. Claiborne*, 439 F.3d at 481. In fact, the Eighth Circuit demands "extraordinary" justification for any sentence falling fifty percent or more below the minimum guidelines term–whether the actual difference in time amounts to two years, as in Claiborne's case, *see* Appendix at p. 2, or twelve. *See, e.g., United States v. McMannus*, 436 F.3d 871, 875 (8th Cir. 2006) (rejecting sentence that fell 142 months below guidelines floor).

The shift in appellate focus from the reasonableness of a district court's chosen sentence in light of all the section 3553(a) factors to the reasonableness of *not* using the guidelines range and the reasonableness of the degree of guidelines variance, elevates the Guidelines calculation in section 3553(a)(4)(i) above all

other section 3553(a) considerations without any justification in the language or reasoning of *Booker*.

The Eighth Circuit purports to justify the Guidelines' domination of its reasonableness review on the basis that "[t]he Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study." *United States v. Claiborne*, 439 F.3d at 481. That is, the Eighth Circuit treats the Guidelines as the presumptively reasonable amalgamation of all the section 3553(a) factors. To the contrary, the Guidelines say little about "the history and characteristics of the defendant," a primary sentencing factor in section 3553(a). The Guidelines prohibit consideration of many individualized factors, such as lack of guidance as a youth and similar circumstances, drug or alcohol dependence or abuse, aberrant behavior involving drug trafficking, for example. *See* U.S.S.G. §§ 5K2.0(d)(1), 5K2.13, 5K2.20(c); *United States v. Jimenez-Beltre*, 440 F.3d 514, 527 (1st Cir. 2006) (Lipez. J., dissenting). In drafting the Guidelines, the Sentencing Commission ignored a defendant's rehabilitative needs, other than requiring judges to assess the need for training and treatment when imposing conditions of probation or supervised release. *See* U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* ("Fifteen

Year Report") at 3 (2004). Furthermore, sentencing judges–unlike the United States Sentencing Commission–bear a statutory mandate to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [§ 3553(a)(2)]." 18 U.S.C. § 3553(a).

The sentencing judge's duty to impose a sentence "sufficient, but not greater than necessary" to serve the § 3553(a) factors played a critical role in the choice of a 15-month sentence for Claiborne. Appendix, pp. 6-7. The judge clearly explained her judgment that imposing a term within the 37 to 46 month guidelines range "would be tantamount to throwing [Claiborne] away." *Id.* The judge's reasoning reflected her concern that the guidelines range would negate the sentencing factors of providing Claiborne with correctional treatment in the most effective manner, and the need to protect the public from future crimes in the absence of such rehabilitation. 18 U.S.C. §§ 3553 (a)(2)(c), 3553(a)(2)(D).

The Eighth Circuit did not suggest that the sentencing court's judgment in this regard was wrong; it simply ignored this concern notwithstanding the critical role it played in the district court's judgment. Appendix, pp. 6-7. The Eighth Circuit resorted to reasoning by declaration, asserting that the guidelines already took into account the district court's concerns about Claiborne's lack of criminal history, and the smallness of the drug quantity involved. Appendix, p. 3-4. The

Eighth Circuit reversed the district court's judgment using essentially the same reasoning it would have employed prior to *Booker*: the district court failed to apply the guidelines in the absence of factors that justified a departure. *Booker*, 543 U.S. at 259, describing §3553(b)(1).

The three circuits that have expressly rejected a "presumption of reasonableness" – the First, Second, and Third circuits – perceived that the practical effect of such presumption would be to revive the binding nature of the guidelines. *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (although making guidelines "presumptive" or reasonable *per se* would not make them mandatory, "it tends in that direction"); *United States v. Fernandez*, 443 F.3d 19, 27 (2nd Cir. 2006) (same); *United States v. Cooper*, 437 F.3d 324, 331 (3rd Cir. 2006) (declaring the guidelines range reasonable *per se* "would come close to restoring the mandatory nature of the guidelines excised in *Booker*"); *United States v. Zavala*, 443 F.3d 1165, 1171 (9th Cir. 2006) (treating guidelines range as presumptive sentence brings the court "perilously close to the mandatory Guidelines regime squarely rejected by the Supreme Court in *Booker*."). The Eighth Circuit's use of such a presumption vindicates the caution expressed by these other jurisdictions.

The Eighth Circuit's adoption of the Guidelines range for cocaine base denied deference to the judge's assessment of the "seriousness of the offense," ignoring the Sentencing Commission's caution that the crack guidelines are not justified

The Eighth Circuit's enforcement of a presumption of reasonableness in the Sentencing Guidelines calculation for crimes involving cocaine base is particularly unfounded. The guidelines embody a 100:1 disparity in the way cocaine base offenses are treated compared to similar offense involving cocaine powder. The Sentencing Commission has issued multiple reports since 1993 declaring this disparity to be unjustified. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997); U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 10 (2002).

The Eighth Circuit's automatic endorsement of the guidelines calculation of the offense level further denied the substantial deference due the district court's assessment of the "seriousness of the offense." 18 U.S.C. § 3553(a)(2)(A). The district court dutifully assessed the seriousness of the offense in compliance with her statutory obligation. Appendix, p. 6. The court admonished petitioner Claiborne that his crimes were serious, yet the judge continued,"when I compare

your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger – much [larger] amount of drugs – and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that." *Id.* In fact, a first time offender convicted of distribution crimes involving a total of 5.23 grams of cocaine *powder* would have an offense level of 12 and an advisory guidelines range of 10 to 16 months. *See* U.S.S.G. §2D1.1(c)(14).

In the wake of *Booker*, neither the guidelines for crack nor powder cocaine bind the district court. The district court's choice of a 15-month sentence–near the high end of the range authorized for cocaine powder offenses involving up to 50 grams–is consistent with treating offenses involving cocaine base more seriously than similar offenses involving powder cocaine, while it simultaneously fulfills the judge's statutory duty to impose a sentence sufficient, but not greater than necessary to achieve both punishment and correctional treatment. *See* 18 U.S.C. § 3553(a)(2)(A), (D).

The *Booker* remedy did not stop the information-gathering process of the United States Sentencing Commission or the evolving nature of the Sentencing Guidelines calculations. The Court exhorted the Sentencing Commission to "collect and study appellate court decisionmaking" and to "modify its Guidelines

in light of what it learns, thereby encouraging what it finds to be better sentencing practices," and "thereby promot[ing] uniformity in the sentencing process." 543 U.S. at 263. The sentencing judge's independent evaluation of the seriousness of the offense in this case, as well as her judgment of the most effective correctional treatment for the defendant, embodies the very type of information *Booker* envisioned to flow under an advisory guidelines system. No such evolution can occur by enforcing the guidelines as a static set of sentence calculations.

The Eighth Circuit substitutes presumptive reasonableness in the Guidelines range for the substantial deference granted a sentencing judge's discretion, and effectively applies the *de novo* style of review struck down in *Booker*

As previously noted, the *Booker* remedy required the excision of the 2004 version of § 3742(e), particularly its requirement of *de novo* review of Guidelines departures "to make the Guidelines even more mandatory than they had been" *Booker*, 543 U.S. at 261. In its place the Court prescribed a standard of appellate review like the one used to review sentences imposed outside the applicable guidelines for "unreasonableness" prior to 2003. *Booker*, 543 U.S. at 261, *citing* §3742(e)(3) (1994 ed.). Under such review, the district court's decision to depart from the guidelines was entitled in most cases to "substantial deference, for it embodie[d] the traditional exercise of discretion by a sentencing court." *Koon v.*

United States, 518 U.S. at 98.

The district court judge based her assessment of Claiborne's rehabilitative capacities and the excessiveness of the advisory guidelines range – and, thus, her discretionary sentencing judgment – on her experiences sentencing countless other defendants. Appendix, p. 6-7. This type of determination falls within a class of decisions historically granted substantial deference in light of the district court's "refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon v. United States*, 518 U.S. at 98. The development of the binding guideline sentencing regime did not alter the traditional judicial view that "'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" *Williams v. United States*, 503 U.S. 193, 205 (1992), *quoting Solem v. Helm*, 463 U.S. 277, 290, n. 16 (1983). "District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Koon v. United States*, 518 U.S. at 98.

The considerations favoring a deferential "abuse of discretion" standard have even greater force now, given the expanded discretion and considerations sentencing judges must consider under the advisory system *Booker* created.

Unshackled from the Guidelines prior exclusion of judicial consideration for a defendant's personal background and rehabilitative needs, judges now face a far broader range of sentencing considerations. *Booker*, 543 U.S. at 245-46.

The Eighth Circuit, however, awards deference to the guidelines range, not the reasons for the sentence, "as stated by the district court." *Booker*, 543 U.S. at 261. In Claiborne's case, the court of appeals did not even mention the sentencing judge's most salient consideration that imposing a guidelines sentence would be "tantamount to throwing [Claiborne] away." The Eighth Circuit instead presumed that the guidelines range was reasonable, and labeled the 22 month difference between the lowest guidelines term and the district court's sentence an "extraordinary variance" based on a mathematical calculation that fifteen months is sixty percent less than the minimum 37 months the guidelines required. *Id. United States v. Claiborne*, 439 F.3d at 481. The Eighth Circuit then declared that "comparably extraordinary circumstances" (sixty percent's worth) did not exist in the case to justify the percentage variance. The Eighth Circuit rejected the district court's reference to Claiborne's lack of a criminal record and the small amount of drugs involved, because the Eighth Circuit viewed those factors as sufficiently accounted for by the guidelines formula. *United States v. Claiborne*, 439 F.2d at 481. Appendix, p.3-4. The appellate court further declared that the sentencing

judge unreasonably failed to infer that Claiborne had distributed additional quantities of drugs in light of the fact he was charged with two drug crimes six months apart. *United States v. Claiborne*, 439 F.3d at 481.

The Eighth Circuit's approach cannot be squared with the deferential abuse of discretion standard used to assess the "reasonableness" of non-guidelines sentences prior to 2003. *Koon v. United States*, 518 U.S. at 98. The Eighth Circuit made no reference to the sentencing factors most salient to the district court – the judge's assessment of Claiborne's characteristics and the negative impact of the guidelines range on his rehabilitation. The Court of Appeals instead enforced its *sua sponte* inference on appeal that Claiborne engaged in other uncharged and unproved drug crimes. *United States v. Claiborne*, 439 F.3d at 481.

The Eighth Circuit describes its standard of "reasonableness" review as "a standard akin to our traditional review for abuse of discretion." *Id.* An abuse of discretion may occur under this standard when (1) a court fails to consider a relevant factor "that should have received significant weight," (2)"a court gives significant weight to an improper or irrelevant factor," or (3) considers "only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside of *the limited range of choice dictated by the facts of*

the case." *United States v. Haack*, 403 F.3d at 1004 (emphasis added). The Eighth Circuit borrowed this phraseology from civil cases relating to rulings on motions to dismiss without prejudice, among other things. *Id.*, *quoting Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984). The Eighth Circuit notably failed to import from those same civil cases the principle that "in every case, we as an appellate court must be mindful that the district courts are closer to the facts and the parties, and that not everything that's important about a lawsuit comes through on the printed page." *Kern v. TXO Production Corp.*, 738 F.2d at 970.

The Eighth Circuit's resort to a "presumption of reasonableness" in the guidelines range, in lieu of the substantial deference historically due the sentencing judge's discretionary sentencing determination, results in a *de novo*-style of review, as Claiborne's case demonstrates. The appellate court, which had no opportunity to observe – much less question – Claiborne, presumes the proper range of sentence falls within the guidelines range. The appellate court made no mention of the sentencing judge's personal assessment of the defendant and the impact harsher sentences would have on his correction and rehabilitation. In withholding the substantial deference historically granted a district court judge's greater personal experience in sentencing, the Eighth Circuit uses a mathematical

exercise to declare the proportional force or "strength" of the justification the district court must muster to overcome the guidelines calculation.

The Eighth Circuit thus awards a sure advantage to the guidelines range – just as the *de novo* standard of guidelines departures did under the 2003 amendments to Section 3742(e). *Booker*, 543 U.S. at 261. So unwilling has the Eighth Circuit been to apply the deferential "reasonableness" review ordered in *Booker* that it recently reversed a sentencing "variance" from the guidelines that a sentencing judge based on the defendant's age and drug problems because the Guidelines advised that those considerations do not generally justify departures from the guidelines. *United States v. Lee*, 2006 U.S. APP. LEXIS 18173, *6 - *7 (8th Cir., July 20, 2006). The court of appeals's substituted its own *de novo* judgment that the cold record regarding Lee's circumstances did not warrant a downward variance because it did not warrant a downward departure. *Id.* The Court enforced the Guidelines range the same way it would have under the appellate review that applied prior to *Booker*.

The Circuit Conflict Regarding the "presumption of reasonableness" in guidelines review promotes disparity in sentencing

The split among the circuits over the use or rejection of a "presumption of reasonableness" in the guidelines when reviewing post-*Booker* sentences promotes

disparate sentencing results. The Eighth Circuit overturned Claiborne's sentence, making no mention of the district court's dominant sentencing concern for his chances for rehabilitation and dismissing the court's reference to his age, his otherwise clean record, and the small amount of drugs involved. In the Eleventh Circuit, which has not employed a presumption of guidelines reasonableness, the appellate court affirmed a similarly large guidelines variance from the guidelines for selling crack cocaine based on a defendant's age, minimal criminal record, and his health. *United States v. Williams*, 435 F.3d 1350, 1354-55 (11th Cir. 2006). The Eleventh Circuit measured the reasonableness of the sentence by focusing on the propriety of the sentencing considerations stated by the judge, which paralleled those cited by the judge that sentenced Claiborne. *Id.* The district court in the Eleventh Circuit did not have to justify its 'failure' to apply a guidelines sentence – much less provide justification proportional to the extent of the percentage variation from the guidelines range. The Eleventh Circuit would clearly have upheld Claiborne's sentence.

This Court's remedial majority in *Booker* opinion affirmatively admonished that the reasonableness review it prescribed would not provide the type of sentencing "uniformity" Congress originally sought to secure in sentencing. *Booker*, 543 U.S. at 263. However, the Court did not condone disparate sentences generated

by the use of conflicting standards of reasonableness review amongst the circuits.

CONCLUSION

WHEREFORE, for the foregoing reasons, petitions this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

Appendix to Petition for Writ of Certiorari

CONTENTS

1. Appellate Opinion in *United States v. Claiborne* (Feb. 27, 2006) ..... 1 - 4

2. Order denying Rehearing/Rehearing en banc (April 27, 2006) 5

3. Portions of Sentencing Transcript, *United States v. Claiborne* ..... 6 - 7

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2198

United States of America,	*	
	*	
Plaintiff - Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Eastern District of Missouri.
Mario Claiborne,	*	
	*	
Defendant - Appellee.	*	

Submitted: December 13, 2005
Filed: February 27, 2006

Before LOKEN, Chief Judge, WOLLMAN and RILEY, Circuit Judges.

LOKEN, Chief Judge.

Mario Claiborne pleaded guilty to two counts of possessing and distributing cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). The district court determined that Claiborne's advisory guidelines sentencing range is 37 to 46 months in prison and imposed a 15-month sentence. The government appeals the sentence as unreasonable under 18 U.S.C. § 3553(a). We agree and remand for resentencing.

In May 2003, Claiborne was arrested for attempting to sell 0.23 grams of cocaine base to an undercover police officer. Six months later, police approached Claiborne engaged in what appeared to be a drug deal. He fled through the house next

door, throwing down a plastic baggie containing 5.03 grams of cocaine base. Claiborne was charged with and pleaded guilty to distributing cocaine base during the first incident and possessing cocaine base during the second.

At sentencing, the district court granted Claiborne "safety valve" relief from the five year mandatory minimum sentence under 18 U.S.C. § 844(a). See 18 U.S.C. § 3553(f); U.S.S.G. §§ 2D1.1(b)(7), 5C1.2. The court also rejected the government's position that he should receive a two-level increase for reckless endangerment because he fled through a nearby residence. See U.S.S.G. § 3C1.2. These rulings resulted in a guidelines sentencing range of 37 to 46 months in prison, which is not at issue on appeal. Recognizing that the guidelines are advisory under United States v. Booker, 543 U.S. 220 (2005), the district court sentenced Claiborne to 15 months in prison, concluding that "the 37 month low end of the range is, in my view, excessive" because of Claiborne's lack of criminal history, young age, the small quantity of drugs involved, and the court's opinion that Claiborne was not likely to commit similar crimes in the future. The government appeals, arguing that 15 months is an unreasonable downward variance from the guidelines range.

Under Booker, the sentencing guidelines are no longer a mandatory regime. Instead, the district court must take the advisory guidelines into account together with other sentencing factors enumerated in 18 U.S.C. § 3553(a). 543 U.S. at 259-60. In fashioning an appropriate sentence, the district court must first calculate the applicable guidelines sentencing range. United States v. Haack, 403 F.3d 997, 1002-03 (8th Cir.), cert. denied 126 S.Ct. 276 (2005). The court may then impose a sentence outside the range in order to "tailor the sentence in light of the other statutory concerns" in § 3553(a). Booker, 543 U.S. at 245-46. When the district court has correctly determined the guidelines sentencing range, as in this case, we review the resulting sentence for reasonableness, a standard akin to our traditional review for abuse of discretion.

The Guidelines were fashioned taking the other § 3553(a) factors into account and are the product of years of careful study. Thus, the guidelines sentencing range, though advisory, is presumed reasonable. See United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005). When the district court varies from the guidelines range based upon its analysis of the § 3553(a) factors, we must examine whether "the district court's decision to grant a § 3553(a) variance from the appropriate guidelines range is reasonable, and whether the extent of any § 3553(a) variance . . . is reasonable." United States v. Mashek, 406 F.3d 1012, 1017 (8th Cir. 2005); see Haack, 403 F.3d at 1004. "Sentences varying from the guidelines range . . . are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a). How compelling that justification must be is proportional to the extent of the difference between the advisory range and the sentence imposed." United States v. Johnson, 427 F.3d 423, 426-27 (7th Cir. 2005) (citation omitted). A "range of reasonableness" is within the court's discretion. United States v. Saenz, 428 F.3d 1159, 1165 (8th Cir. 2005).

Here, the district court imposed a 15-month sentence when the bottom of Claiborne's advisory guidelines range was 37 months. This is a sixty percent downward variance. "An extraordinary reduction must be supported by extraordinary circumstances." United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005). We conclude that the sixty percent reduction granted to Claiborne was an extraordinary variance that is not supported by comparably extraordinary circumstances. Claiborne's lack of criminal history was taken into account when the safety valve eliminated an otherwise applicable mandatory minimum sentence. The small amount of crack cocaine seized during his two offenses was taken into account in determining his guidelines range. Substantially reducing the resulting guidelines range sentence based upon drug quantity is unreasonable because it is a fair inference that Claiborne distributed additional quantities of cocaine during the six months between the two occasions interdicted by the police. Similarly, while the district court properly focused on the likelihood Claiborne would commit further crimes in the future, the

fact that he committed a second serious drug offense six months after his first arrest demonstrates that Claiborne has not earned an extraordinary downward variance from a guidelines sentence that already reflects substantial leniency.

For the foregoing reasons, we conclude that the sentence is unreasonable and remand to the district court for resentencing.

2038244

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

FILED

APR 27 2006

MICHAEL GANS
CLERK OF COURT

No. 05-2198

United States of America,

Appellant,

vs.

Mario Claiborne,

Appellee.

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Bye and Judge Smith would grant the petition for rehearing en banc.

Judge Gruender did not participate in the consideration or decision of this matter.

(5128-010199)

April 27, 2006

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

from him, aside from inheriting his docket when his took senior status, I've gotten used to lecturing people. He was really good at that. I can't come close. But it really does disturb me when I see someone of your age in a federal courtroom about to go to prison. Most 21-year-olds are not out there selling drugs, Mr. Claiborne.

What you are doing is not normal behavior, and it doesn't have to be the only thing that you do in life. I know there are a lot of things you want for yourself and for your family. But you are going to have to learn how to get those things through legitimate means, just like the majority of people do. And you may have to do without some things.

You don't have to have the latest music or the latest fashions, even though you want them, because your freedom has got to be more important to you than some fad. Okay? When you get to the point where you value your freedom more, I think that you will change your whole attitude about what you do in life.

Now I want to talk to you about Mrs. Clemons. This lady had every right to have her door open on a nice day while she was outside with her children. You had absolutely no right to run through her house. Going into someone's house in that way is a personal violation. I understand you didn't threaten anyone. And your only thought probably was, "How do I get away from the police?" But you had no business

involving Mrs. Clemons and her family in your crime. That is unforgivable.

I am concerned that the Sentencing Guidelines, while they take into account a lot of factors, in this situation, the 37-month low end of the range is, in my view, excessive in light of your criminal history which is zero and in light of the circumstances involved in this case. I don't want to minimize what you did, because what you did was very serious. You committed two serious felony crimes.

However, when I consider the quantity of drugs that are involved; the fact that you qualify for the safety valve; and your criminal history; and the likelihood of your committing further similar crimes in the future, I come to the conclusion that a 37-month sentence would be tantamount to throwing you away.

I don't think that that's appropriate in your situation. And when I compare your situation to that of other individuals that I have seen in this court who have committed similar crimes but perhaps involving a larger -- a much amount of drugs -- and the sentences that they receive, I don't believe that 37 months is commensurate in any way with that.

As I said before, I do believe some term of imprisonment is appropriate in your case. And I hope that you don't view this as just the cost of doing business, and I